88-795

No.

SUPREME COURT, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

JOHN JUDGE, JOE CHOO, AND GARY CLARK,
Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

Did the District Court and the Court of Appeals err in determining that the Civil Service Reform Act precludes District Court review of personnel actions previously reviewable under the Administrative Procedure Act?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceedings below were the Petitioners, John Judge, Joe Choo and Gary Clark, Plaintiffs below, and the United States Department of Agriculture, defendant below.

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JOHN JUDGE, JOE CHOO, AND GARY CLARK,
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v.

UNITED STATES DEPARTMENT OF AGRICULTURE
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNTIED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

John Judge, Joe Choo and Gary Clark hereby petition that a writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on August 9, 1988.

OPINION BELOW

The judgment and opinion of the United States Court of Appeals for the Eleventh Circuit was entered on August 9, 1988 (No. 87-8738). The opinion, which is unreported, is contained in the Appendix at page 1. The opinion of the United States District Court for the Northern District of Georgia, which is not reported, is contained in the Appendix at page 3. The United States Court of Appeals did not enter a separate judgment.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on August 9, 1988 affirming judgment against petitioners entered by the United States District Court for the Northern District of Georgia on June 8, 1987.

The jurisdiction of this Court is invoked under and pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Section 701 of 5 U.S.C. provides:

(a) This chapter applies, according to the provisions thereof, except to the extent that--

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter--

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) ''person;;, ''rule'', ''order'', ''license'', ''sanction'', ''relief'', and ''agency action'' have the meanings given them by section 551 of this title.

Section 702 of 5 U.S.C. provides:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial reviw therof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Section 704 of 5 U.S.C. provides:

Agency action made reviewable by statute an final agency action for which there is not other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency

action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Section 706 of 5 U.S.C. provides:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Section 7512 of 5 U.S.C. provides:

This subchapter applies to--

(1) a removal;

(2) a suspension for more than 14 days;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but does not apply to--

(A) a suspension or removal under section 7532 of this title,

(B) a reduction-in-force action under section 3502 of this title,

(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,

(D) a reduction in grade or removal under section 4303 of this title, or

(E) an action initiated under section 1206 or 7521 of this title.

Section 7513 of 5 U.S.C. provides:

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employe against whom an action is proposed is entitled to--

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attoryney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an

action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

Section 7701 of 5 U.S.C. provides:

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right--

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

(b) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeasl, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision--

(A) in the case of an action based on unacceptable performance described in section 4303 of this title, is supported by substantial evidence, or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment--

(A)shows harmful error in the application of the agency's pro-

cedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

(d)(1) In any case in which--

(A) the interpretation or application of any civil service law, rule, or regulation, under the jurisdiction of the Office of Personnel Management is at issue in any proceeding under this section; and

(B) the Director of the Office of Personnel Management is of the opinion that an erroneous decision would have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office;

the Director may as a matter of right intervene or otherwise participate in that proceeding before the Board. If the Director exercises his right to participate in a proceeding before the Board, he shall do so as early in the proceeding as practicable. Nothing in this title shall be construed to permit the Office to interfere with the independent decisionmaking of the Merit Systems Protection Board.

(2) The Board shall promptly notify the Director whenever the interpretation of any civil service law, rule, or regulation under the jurisdiction of the Office is at issue in any proceeding under this section.

(e)(1) Except as provided in section 7702 of this title, any decision under subsection (b) of this section shall be final unless--

(A) a party to the appeal or the Director petitions the Board for review within 30 days after the receipt of the decision; or

(B) the Board reopens and reconsiders a case on its own motion.

The Board, for good cause shown, may extend the 30-day period referred to in subparagraph (A) of this paragraph. One member of the Board may grant a petition or otherwise direct that a decision be reviewed by the full Board. The preceding sentence shall not apply if, by law, a decision of an administrative law judge is required to be acted upon by the Board.

(2) The Director may petition the Board for a review under paragraph (1) of this subsection only if the Director is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office.

(f) The Board, or an administrative law judge or other employee of the Board designated to hear a case, may--

(1) consolidate appeals filed by two or more appellants, or

(2) join two or more appeals filed by the same appellant and hear and decide them concurrently,

if the deciding official or officials hearing the cases are of the opinion that the action could result in the appeals' being processed more expeditiously and would not adversely affect any party.

(g)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is te prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

(2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

(h) The Board may, by regulation, provide for one or mor alternative methods for settling matters subject to the appellate jurisdiction of the Board which shall be applicable at the election of an applicant for employment or of an employee who is not in a unit for which a labor organization is accorded exclusive recognition, and shall be in lieu of other procedures provided for under this section. A decision under such a method shall be final, unless the Board reopens and reconsiders a case at the request of the Office of Personnel Management under subsection (e) of this section.

(i)(1) Upon the submission of any appeal to the Board under this section, the Board, through reference to such categories of cases, or other means, as it determines appropriate, shall establish and announce

publicly the date by which it intends to complete action on the matter. Such date shall assure expeditious consideration of the appeal, consistent with the interests of fairness and other priorities of the Board. If the Board fails to complete action on the appeal by the announced date, and the expected delay will exceed 30 days, the Board shall publicly announce the new date by which it intends to complete action on the appeal.

(2) Not later than March 1 of each year, the Board shall submit to the Congress a report describing the number of appeals submitted to it during the preceding fiscal year, the number of appeals on which it completed action during that year, and the number of instances during that year in which it failed to conclude a proceeding by the date originally announced, together with an explanation of the reasons therefor.

(3) The Board shall by rule indicate any other category of significant Board action which the Board determines should be subject to the provisions of this subsection.

(4) It shall be the duty of the Board, an administrative law judge, or employee designated by the Board to hear any proceeding under this section to expedite to the extent practicable that proceeding.

(j) The Board may prescribe regulations to carry out the purpose of this section.

Section 7703 of 5 U.S.C. provides:

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be the named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision issued by the Board under section 7701. In review of a final order or decision issued under section 7701, the agency responsible for taking the action appealed to the Board shall be the named respondent.

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Not-

withstanding any other provision of law, any petition for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be--

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d) The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings

before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

STATEMENT OF THE CASE

A. Course of Proceedings in the Courts Below

On January 16, 1987, petitioners John Judge, Joe Choo and Gary Clark filed suit against the United States Department of Agriculture alleging that respondent's agents allowed nonmerit factors to be used in making personnel decisions and in failing to properly evaluate petitioners' grievances on such matters. In addition, Gary Clark sought review of respondent's refusal to release to him certain documents sought under the Freedom of Information Act. District Court Record 1-1-1, 2.

Respondent filed a Motion to Dismiss Count I of the complaint, that count concerning the challenged personnel and grievance matters. R1-6. Said motion was granted by the District Court on the ground that the Civil Service Reform Act, 5 U.S.C. 7701 et seq., precludes the district court review formerly available in cases such as this under the Administrative Procedure Act, 5 U.S.C. 701, et seq. R1-13-9.

The remaining portion of the complaint, Count II, dealing with the Freedom of Information Act matter, was subsequently voluntarily dismissed by petitioners. R1-15. There remaining nothing pending in the case, the United States District Court entered judgment for respondent on Count I on September 9, 1987 (R1-16), and petitioners filed a Notice of Appeal from such judgment on September 18, 1987. R1-17.

The United States Court of Appeals for the Eleventh Circuit entered judgment affirming the judgment of the United States District Court on August 9, 1988. App. p. 1.

B. Statement of Facts

In June and July 1983 petitioners instituted informal grievances with respondent, complaining of certain acts of the Regional Inspector

General for Inspections, Southeast Region, United States Department of Agriculture. Basically, the acts complained of involved utilizing nonmerit factors in making personnel decision. R1-1-2.

After denial at the intial stage, petitioners filed separate formal grievances in accord with respondent's procedures in August 1983. These grievances were assigned to an agency fact finder. Petitioners informed the fact finder that some witnesses refused to provide written statements, but expressed willingness to obey any instrucitons of the fact finder to testify at a hearing. Ther were numerous issues of contested fact presented in the matters grieved by petitioners. United States Department of Agriculture regulations allow but do not require a hearing on grievances. The fact finder chose not to conduct a hearing. R1-1-3.

Petitioners Choo and Clark contend that, after submitting their grievances, they were subjected to retaliatory acts by the official whom they accused of basing personnel decisions on nonmerit factors. Said allegations were reported to respondent's agents and were made a part of the existing grievances. R1-1-3.

On December 30, 1985, the fact finder issued a recommended decision denying petitioners' grievances. Petitioners contend that such recommended decision did not evidence consideration of all issues raised by petitioners and was based on inadequate development of the case. On January 17, 1986, respondent issued a final administrative decision denying petitioners' grievances. R1-1-4.

The Court of Appeals issued a per ciriam affirmance of the District Court decision. App. p. 1.

C. Existence of Jurisdiction in the Courts Below

Petitioners' claim in the United States District Court for the Northern District of Georgia was based on the Administrative Procedure Act, 5 U.S.C. 701, et. seq. District Court jurisdiction was invoked under 28 U.S.C. 1331. The case was reviewed by the United States Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. 1291.

REASONS FOR GRANTING THE WRIT

I.

THE DISTRICT COURT AND THE COURT OF APPEALS ERRED IN DETERMINING THAT THE CIVIL SERVICE REFORM ACT PRECLUDES DISTRICT COURT REVIEW OF PERSONNEL ACTIONS PREVIOUSLY REVIEWABLE UNDER THE ADMINISTRATIVE PROCEDURE ACT.

The personnel actions involved here are not subject to review by the Merit Systems Protection Board and are not based on discrimination subject tothe equal employment opportunity system. Respondent and the District Court have concluded that there is, therefore, no judicial review of the agency's decisions here. Petitioners disagree. The agency admittedly made a final decision on three employee grievances. Petitioners seek judicial reviw of such final agency decision.

Petitioners point out, as they did in the Courts below, that they are not seeking review under the Civil Service Reform Act. They recognize that there is no private right of action under such act. *Schrachta v. Curtis*, 752 F.2d 1257 (7th Cir. 1985). What petitioners are seeking is judicial review of a final agency decision under the provisions of the Administrative Procedure Act and 28 U.S.C. 1331. Ther seems to be no question that personnel actions of this kind have formerly been subject to District Court review on the record in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. 701, et. seq. *Towers v. Horner*, 791 F.2d 1244 (5th Cir. 1986); *Dugan v. Ramsay*, 727 F.2d 192 (1st Cir. 1984); *Carducci v. Regan*, 714 F.2d 171 (D.C. Cir. 1983).

There is no question that the Courts of Appeal disagree on this issue. Many of the cases cited by respondent rely upon and cite favorably *Carducci v. Regan, supra*. That Court felt that because the "exhaustive remedial scheme of the CSRA" specifically provides for court review of adverse actions, the act must intend to deny what the Court considers "more immediate and direct" Court review of lesser personnel action. 714 F.2d at 174. Indeed that Court was concerned that judicial review outside the purview of the Civil Service Reform Act would be without resort to administrative remedies. *Id.* at 175. Neither would be the case here. Ther has certainly been, as there should be, resort to the administrative procedures established by respondent for

the review of employee grievances. Further, the review sought here is not "more immediate and direct" than that provided for adverse actions under the Civil Service Reform Act. What is sought is review on the record utilizing the standard of whether respondent's action was arbitrary and capricious.

In two of the appellate cases relied upon by respondent and cited by the district court in support of the preemption doctrine, *Broadway v. Block*, 694 F.2d 979 (5th Cir. 1982) and *Veit v. Heckler*, 746 F.2d 508 (9th Cir. 1984), plaintiffs had not properly exhausted administrative remedies. Those courts, as was the court in *Carducci*, were rightfully concerned over the failure to exhaust administrative remedies. No such problem exists here.

Petitioners would also point out that in another case relied upon by respondent, *Schrachta v. Curtis, supra*, the Court found no private right of action under the Civil Service Reform Act but specifically refrained from deciding the issue before this Court:

> "Since Schrachta has not asserted the APA as a jurisdictional basis for his suit, we express no opinion on the correctness of the First Circuit's holding. [In *Dugan v. Ramsay, supra.*]" 752 F.2d at 1260, fn. 5.

These cases aside, it is obvious that several Circuits have taken the position that the Civil Service Reform Act preempts Court review of federal personnel actions such as those involved here since they are not reviewable by the Board. 5 U.S.C. 7512, 7513. Not surprisingly, petitioners consider the opposite conclusion of the United States Court of Appeals for the First Circuit, as set out in *Dugan v. Ramsay, supra*, to be the correct position. There the First Circuit considered the arguments made by respondent here, that APA review was not available because the final agency actions involved were precluded from review by a statute or committed to agency discretion. That Court decided that neither situation applied.

Concerning respondent's allegation that the Civil Service Reform Act precluded judicial review, , it is obvious that the statute does not specifically state this preclusion. It it exists at all, it is an implied one. This the First Circuit was not inclined to find:

> "The government would imply, from the fact that Congress wished to unify much court review of MSPB decisions in the Federal Circuit, a congressional prohibition against court review of final personnel decisions that do not find their way to the MSPB. This conclusion, however, does not follow logically from the premise. It runs counter to the strong presumption in the law that favors reviewability and almost never implies statutory preclusion of review from Congressional silence... It runs counter to a history of court review (as presented here by the government) both before and after the enactment of the CSRA... And, it strikes us as implausible to believe that Congress wished to withdraw court review of even egregious agency behaviour in the area — even if, for example, an agency were to discard applications as a result of bribery or the roll of the dice. We therefore reject it." 727 F.2d at 194, 195.

Neither was the Court of Appeals inclined to believe that agency personnel action not subject to MSPB review is committed by law to agency discretion without judicial review. The Court recognized that an agency possesses broad discretionary power, but found that this "does not mean judicial review is forbidden; it simply means that the reviewing court is unikely to find against the agency, for the agency is unkikely to have acted unlawfully." 727 F.2d at 195.

The District Court distinguished *Dugan* on the ground that it involved an applicant rather that an employee. Petitioners respectfully urge that the principles enunciated in *Dugan* are sound whether applied to applicants or employees. Further, petitioners do not believe that applicants should be placed ina more protected position that are employees.

It is clear that, despite the generally accepted view that the Civil Service Reform Act does create a comprehensive framework for handling appeal of federal personnel actions, the Act doe not preempt the fiels. Certain personnel actions are reviewable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16; the Age Discrimination in Employment Act, 29 U.S.C. 633a; The Veterans Preference Act, 5 U.S.C. 3309; The Equal Pay Act, 29 U.S.C. 206(d); or the Rehabilitation Act of 1973, 29 U.S.C. 791. Violations of some of these Acts are defined as prohibited personnel practices under the Civil Service Reform Act. 5 U.S.C. 2302(b)(1). Yet no claim can be made that the Civil Service Reform Act provides the exclusive means of reaching a reviewing Court for such violations. No more should the fact that the actions involved here are prohibited personnel practices, as well as being matters covered by defendant's Grievance System, mean that the civil SErvice Reform Act provides the exclusive means of obtaining Court review of the Agency action challenged here.

Petitioners recognize that the recent Supreme Court case of *United Sates v. Fausto*, 108 S. Ct. 668 (1988), decided January 25, 1988, presents a serious obstacle to their prevailing here. In that case the Supreme Court of the United States considered the question of whether pre-Civil Service Reform Act remedies for nonpreference eligible employees in the excepted service survived enactment of the Civil Service Reform Act. The Court decided that they did not on the ground that the Civil Service Reform Act is intended to "replace the patchwork system [of federal employment adverse action review] with an integrated scheme of administrative and judicial review..." 108 S.Ct. at 672.

Petitioners would distinguish *Fausto* on the ground that it dealt with an employee in the excepted service, whereas applellants are in the competitive service. As recognized by the Court in *Fausto*, Congress has consistently intended that the employees in the excepted service have less comprehensive protection than employees in the competitive service.

It is true that the majority opinion in *Fausto* assumes that competitive service employees cannot obtain judicial review of minor adverse personnel actions, and perhaps would extend this assumption to review of all agency grievance system decisions. See 108 S.Ct. at 674, fn. 3. Yet the Court goes on to recognize that this assumption has not even been argued in that case. *Id.* Thus we respectfully assert that *Fausto* should not be read to include competitive service employees.

In sum, petitioners urge that a right of judicial review, clearly present before enactment of the Civil Service Reform Act, should not be wiped away by implication because Congress did not specifically deal with it in the Civil Service Reform Act. Congress had no reason to deal with it. A judicial review process under the Administrative Procedure Act had already been established and would continue to function for those actions not included in the new legislation. If Congress intended to preclude judicial review of such personnel actions as are involved here, it knew how to so state. See 5 U.S.C. 8128 where Congress stated that "The action of the Secretary [in federal workers' compensation matters]...is not subject to review by another official of the United States or by a court by mandamus or otherwise" and 38 U.S.C. 211 where Congress stated that:

> "The decisions of the Administrator on any question of law or fact under any law administered by the Veteran's Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official of any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise."

No such language was used in the Civil Service Reform Act and none should be implied.

II.

DUE TO THE CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL, IT IS ESSENTIAL THAT THIS COURT RESOLVE THE QUESTION OF WHETHER ANY JUDICIAL REVIEW EXISTS FOR PERSONNEL ACTIONS SUCH AS ARE PRESENT HERE.

As discussed above, the circuits are not uniform in their decisions on this issue. Admittedly, petitioners' position is in a decided minority, only the First Circuit having specifically found that jurisdiction still exists under the Administrative Prodecure Act for actions not reviewable under the Civil Service Reform Act, but which were reviewable under the Administrative Procedure Act prior to the passage of the Civil Service Reform Act. Nevertheless, a conflict among the circuits does exist.

It is also true that a strong argument exists for the propostion that the *Fausto* decision preordains an adverse decision tho petitioners in the case. Peritioners do not believe that is the case. If it is the case, petitioners respectfully submit that potential plaintiffs and federal agencies alike should be made aware of this in no uncertain terms.

CONCLUSION

For the foregoing reasons, it is urged that the lower courts' decisions that peritioners do not have access to judicial review of their claims is contrary to the proper interpretation of this Court's decisions and therefore it is respectfully submitted that this Court should grant the Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 87-8738

D. C. Docket No. 87-88

JOHN JUDGE,
JOE CHOO,
GARY CLARK,

Plaintiffs-Appellants,

versus

DEPARTMENT OF AGRICULTURE,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(August 9, 1988)

Before VANCE and HATCHETT, Circuit Judges, and NESBITT*, District Judge

Per Curiam:

AFFIRMED. See Circuit Rule 36-1.

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* Honorable Lenore C. Nesbitt, United States District Judge for the Southern District of Florida, sitting by designation.

App. 2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHN JUDGE, et al., :
Plaintiffs,

vs. : CIVIL ACTION
NO. C87-88A

UNITED STATES DEPARTMENT
OF AGRICULTURE, :
Defendant.

ORDER

This matter is before the court on defendant's motion to dismiss Count I of the complaint for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Plaintiffs seek review of defendant United States Department of Agriculture's (USDA) consideration of non-merit factors in making personnel decisions and alleged arbitrary and capricious review of plaintiffs' grievances regarding these personnel decisions. Complaint, Count I.[1] Plaintiffs allege federal jurisdiction under the Administrative Procedure Act (APA), 5 USC §701, *et seq.*, and 28 USC §1331. Defendant contends that the court lacks subject matter jurisdiction under the APA over Count I due to the enactment of the Civil Service Reform Act of 1978, 5 USC §7701, *et seq*, (CSRA)which precludes federal courts from reviewing certain federal personnel cases. Defendant also points out that section 1331 requires an underlying basis of jurisdiction. Finally, defendant contends plaintiffs have failed to exhaust administrative remedies.[2]

[1] In Count II, plaintiff Clark is seeking injunctive relief pursuant to the Freedom of Information Act, 5 USC §552, against defendatn USDA's continued withholding of certain departmental records allegedly related to the challenged personnel action.

[2] Plaintiffs state in their response to defendant's motion that they have exhausted administrative remedies due to their unsuccessful petition for review filed with the Office of Special Counsel. Plaintiffs also state, however, that they do not consider such action a prerequisite to judicial review since they are not seeking review under the CSRA.

Because defendant has come forward challenging the existence of subject matter jurisdiction, the burden of establishing such jurisdiction rests with the plaintiff. *Rosemound Sand and Gravel Company v. Lambert Sand and Gravel Company*, 469 F.2d 416 (5th Cir. 1972). In view of the fact that defendant's motion is a facial attack on plaintiffs' allegations of jurisdiction, all of the factual allegations of plaintiffs' pleadings concerning jurisdiction are presumed to be true, and defendant's motion will be granted only if it appears that plaintiffs' jurisdictional allegations are insufficient on their face to demonstrate the existence of jurisdiction. *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507 (5th Cir.), *cert. denied*, 449 U.S. 953 (1980).

I. THE CIVIL SERVICE REFORM ACT OF 1978.

The CSRA is the principal statute governing federal civil service practices and has been described as "a detailed comprehensive effort to regulate employee-management relations in federal government." *Schrachta v. Curtis*, 752 F.2d 1257 (7th)Cir. 1985). The CSRA establishes an independent Merit Systems Protection Board (MSPB) and Office of Special Counsel (OSC) to adjudicate employee appeals and protect the merit system, and empowers a new Office of Personnel Management (OPM) to supervise personnel management in the executive branch. In regard to its provisions for administrative and judicial review of federal personnel decisions, the CSRA establishes four categories of federal personnel actions and provides for different types of review for each. The first category involves "adverse actions,"[3] for which judicial review is available following administrative proceedings and an administrative appeal to the MSPB. 5 USC §§7703, 7513, 7701. In addition, a second category involving "adverse actions" for which administrative proceedings are required but for which the CSRA provides no appeal to the MSPB is established. 5 USC §7503; S, Rep. No. 95-969, 95th Cong., 2d Sess. 46-47, *reprinted in* 1978 U.S. Code Cong. & Ad. News 2723, 2769; *Schrachta*. The third category involves "prohibited personnel practices" for which review by the OSC is provided. 5 USC §§2302, 1206. The fourth category involves minor personnel actions which are left

[3] 5 USC §7512 lists applicable "adverse actions" as (1) a removal; (2) a suspension for more than fourteen days; (3) a reduction in grade; (4) a reduction in pay; and (5) a furlough of thirty days or less.

to agency discretion and are not reviewable administratively or judicially. *Schrachta*, 752 F.2d at 1259. In addition, 5 USC §7703 (b)(2) provides that cases involving alleged discrimination under Title VII of the Civil Rights Act of 1964, the Equal Pay Act, the Rehabilitation Act, and the Age Discrimination in Employment Act must be filed in Federal District Court.

Plaintiffs concede that the alleged conduct falls into the category of "prohibited personnel practices." The CSRA, in defining "prohibited personnel practices," provides in pertinent part,

> any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority ... take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.

5 USC §2302(b)(11). The procedure governing prohibited personnel practices such as alleged here is set out in 5 USC §1206. That section of the CSRA provides that allegations of prohibited personnel practices are to be received by the OSC. After a preliminary inquiry into the allegations and a determination that reasonable grounds exist to believe a prohibited personnel practice has taken place, the OSC may conduct an investigation. If investagation reveals the allegations to be accurate, the OSC should seek corrective action by the MSPB. The OSC may also either decline to investigate following a preliminary inquiry, after investigation, determine that MSPB review is not warranted. There exists no provision for judicial reviw of a decision by the OSC not to investigate or not to petition the MSPB.[4]

Though plaintiffs' request for an OSC investigation was denied, they do not seek review of this decision. In fact, plaintiffs concede that no private right of action is available to them under this CSRA. Rather, plaintiffs contend that the actions complained of are reviewable under the APA. In effect, it is plaintiffs' position that the CSRA does not eliminate a right of action which existed prior to its enactment. *See Carducci v. Regan*, 714 F.2d 171 (D.C.Cir. 1983).

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[4] At least one court has held that such OSC decisions are reviewable only as to the adequacy of the preliminary inquiry. *Cutts v. Fowler*, 692 F.2d 138 (D.C.Cir. 1982). In the instant case, however, plaintiffs do not seek review of any such OSC decision.

The question whether a prohibited personnel practice continues to be reviewable by district courts under the APA, 5 USC §701, *et seq.*, after enactment of the CSRA in the absence of an express preclusion has been addressed by other courts. In *Broadway v. Block*, 694 F.2d 979 (5th Cir. 1982), the plaintiff was an employee of the Farmer's Home Administration contesting a reassignment. No reduction in grade or pay resulted, so the action complained of was properly classified a "prohibited personnel practice." In holding that enactment of the CSRA precluded judicial review, the court expressed concern that an opposite holding would neutralize the Act. The court stated,

> ... the CSRA creates an extensive scheme regulating civil service personnel decisions. Some agency actions are reviewable by circuit courts, some by district courts, and some by no court at all. We decline to allow an employee to circumvent this detailed scheme governing federal employer-employee relations by suing under the more general APA.

694 F,2d at 986. The court further noted that continuing to allow suit under the APA after enactment of the CSRA would "... encourage aggrieved employees to bypass the statutory and administrative remedies in order to seek direct judicial relief and thereby deprive the Government of the opportunity to work out its personnel problems within the framework it has so painstakingly established." *Id.*, citing *Bush v. Lucas*, 647 F.2d 573 (5th Cir. 1981) *aff'd*, 462 U.S. 367 (1982).

In *Carducci*, the plaintiff was an employee of the United States Customs Service. As in *Broadway*, the challenged action was a reassignment involving no reduction in grade or pay. The court noted that the CSRA expressly provides for formal administrative proceedings, an appeal to the MSPB, and judicial review for adverse actions, while investigation and corrective action by the OSC is the exclusive avenue of relief provided for the lesser actions classified as prohibited personnel practices. The court determined that to allow one complaining of a mere prohibited personnel practice to bypass the procedures established by the CSRA would be to allow an access to the courts more immediate and direct than that provided those complaining of adverse actions, and would impermissibly frustate the exhaustive remedial scheme of the CSRA. Referring to the absence of any express preclusion of APA review, the court stated that "... failure to

include some types of nonmajor personnel action within the remedial scheme of so comprehensive a piece of legislation reflects a congressional intent that no judicial relief be available -- that the matter be deemed 'committed to agency discretion by law'" within the meaning of APA section 701(a)(2).

Other courts have reached similar conclusions citing favorably the principles of *Broadway* and/or *Carducci*, including *Weatherford v. Dole*, 762 F.2d 392 (10th Cir. 1985); *Pinar v. Dole*, 747 F.2d 899 (4th Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985); *Veit v. Heckler*, 746 F.2d 508 (9th Cir. 1984); *Towers v. Horner*, 791 F.2d 1244 (5th Cir. 1986); *Gray v. OPM*, 771 F.2d 1504 (D.C.Cir. 1984), *cert. denied*, 106 S.Ct. 1476 (1986); and *Schrachta*.

One court has reached the opposite conclusion. In *Dugan v. Ramsay*, 727 F.2d 192 (1st Cir. 1984), the plaintiff was an applicant for the position of federal administrative law judge. The challenged action was the OPM's processing of the application, which plaintiff attacked as arbitrary. The district court dismissed the case on the ground that plaintiff was complaining of a prohibited personnel practice and had failed to invoke the administrative remedy provided him by the CSRA, namely, the right to petition the OSC. In reversing the district court, the court of appeals refused to imply congressional intent to deny review from the CSRA, stating that to do so would be contrary to the strong legal presumption that favors reviewability and rarely implies statutory preclusion of review from congressional silence. The court also believed it would be inconsistent to hold that prohibited personnel practices were not subject to judicial review while the CSRA expressly provides for judicial review of adverse actions.

The decision in *Dugan* may be distinguished without addressing the merits of its basis. The plaintiff was an applicant for a federal position, not a federal employee. As such, his status was more comparable to that of a probationary employee. As one district court in the same circuit stated,

> Probationary employees have comprised a fairly well-recognized exception to this rule [that the CSRA is an exclusive remedial scheme]. Some courts, singling out the second-class CSRA status of probationary employees, have reacted by interpreting the Act narrowly as to them. In such

> straitened circumstances, Congress has been assumed not to have foreclosed probationers from collateral attack by means of a statute which arguably lacks a complete and integrated administrative process for such persons.

Tucker v. Defense Mapping Agency Hydrographic/Topographic Center, 607 F. Supp. 1232 (D.C.R.I. 1985); *See also Beverlin v. Internal Revenue Service*, 574 F. Supp. 553 (W.D.Mo. 1983). In any event, the decision in *Dugan* is uncompelling and is contrary to the great weight of authority. For these reasons, the decisions in *Broadway* and *Carducci* are followed by the court, as they have been by several other circuits.

In sum, the actions of the defendant USDA of which plaintiffs complain fall within the definition of "prohibited personnel practices." In view of this, plaintiffs' exclusive avenue of relief as set out in the CSRA is petition to the OSC for investigation. No appeal to the MSPB is provided except as determined by the OSC. Furthermore, no provision for judicial review of any agency personnel action is made except as to that of the MSPB. As a result, the CSRA precludes district court review previously available pursuant to the APA, 5 USC §701, *et seq.*, and, therefore, the court lacks subject matter jurisdiction over Count I of plaintiffs' complaint.

II. EXHAUSTION OF ADMINISTRATIVE REMEDIES AND 28 USC §1331.

Defendant also contends that even if the court determines that the CSRA does not preclude judicial review, plaintiffs have failed to exhaust administrative remedies. Though there appears to be some question as to whether plaintiffs petitioned the OSC, it bears no impact on this case. As stated above, the CSRA provides the exclusive avenue of relief for federal employees complaining of prohibited personnel practices. For this same reason, the court need not address defendant's contention that plaintiffs have failed to demonstrate an independent basis of jurisdiction for 28 USC §1331.

III. THE AGENCY GRIEVANCE SYSTEM.

Plaintiffs further contend that the defendant's processing of their grievances through the Agency Grievance System was arbitrary and capricious. Plaintiffs therefore also seek review of the defendant's grievance procedures.

Pursuant to the CSRA, 5 USC §1302, and other authorities, each agency is required by the OPM to establish a grievance system within certain specified guidelines. 5 C.F.R. §771. There is no express provision authorizing judicial review of such an agency grievance system in the CSRA. In addition, the court in *Broadway*, addressing this same question, noted that the regulation mandating the establishment of the grievance systems "does not even contemplate administrative review of individual complaints about the processing of grievances." 694 F.2d at 983. The regulation provides in pertinent part,

> The Office of Personnel Management shall review from time to time each agency administrative grievance system developed under this part to determine whether the administrative grievance system meets the requirements of this part. The Office does not act on a request by an employee to review the processing of, or the decision on, an individual grievance.

5 C.F.R. §771.304. Based on this language and the absence of any review provision within the CSRA, the court determined that judicial review of the agency grievance systems is inappropriate. It would be equally inappropriate in this case.

IV. CONCLUSION

Defendant's motion to dismiss count I is GRANTED.

SO ORDERED THIS 4th day of June, 1987.

J. OWEN FORRESTER
UNITED STATES DISTRICT JUDGE